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No. 82-36

In the Supreme Court of the United States

OCTOBER TERM, 1982

HARMON WESLEY SHIELDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment or 18 U.S.C. (& Supp. IV) 2511 was violated where petitioner's conversation with a co-defendant was recorded with the co-defendant's consent.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-17a) is reported at 675 F. 2d 1152.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1982. The petition for a writ of certiorari was filed on July 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of conspiracy to obstruct interstate commerce by extortion, in violation of 18 U.S.C. 1951 (Count 1), and of two counts of attempting to obstruct interstate commerce by extortion, in violation of 18 U.S.C. 1951 and 1952 (Counts 2 and 3). He was sentenced to three concurrent

five-year terms of imprisonment and was fined $10,000 on each count (Pet. App. 1a-2a).[1] The court of appeals affirmed (Pet. App. 3a-4a).

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 4a-8a). The evidence showed that, while he was Executive Director of the Florida Department of Natural Resources, petitioner conspired with Jack Quick, a real estate broker, to extort money from another broker, Bruce McIver. In 1978, McIver attempted to sell two large parcels of land to the State of Florida under the state's Environmentally Endangered Lands Program. One tract was known as "Seminole Ranch" and the other as "Big Talbot Long Island." Before the State could purchase land under this program, Florida's Interagency Advisory Committee ("IAC") was required to recommend the purchase to the Governor and his cabinet. Petitioner was chairman of the IAC and had considerable influence with respect to such recommendations (Pet. App. 4a).

In March 1978, McIver had spoken to Quick and requested that petitioner recommend him as a broker to the owners of the Seminole Ranch property. Quick arranged for McIver to meet with petitioner, and the latter agreed to help McIver. A few weeks later, McIver agreed to pay Quick a commission of $100,000 if McIver obtained the right to act as broker for the sale of the Seminole Ranch tract. In May, McIver obtained that right. He stood to make a commission of $600,000 if the sale were completed. Petitioner then instructed his deputy in the Department of Natural Resources to recommend to the IAC on behalf of the Department that the State purchase the Seminole

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[1] Pursuant to 18 U.S.C. 4205(b)(1), the court also provided that petitioner will become eligible for parole after serving a minimum term of one year's imprisonment.

Ranch property. In August, the IAC met and voted to recommend the purchase (7 R. 179-181; 8 R. 14-19, 24-26).[2]

In September, the Governor and the cabinet accepted the IAC's recommendation. Shortly thereafter, Quick informed McIver that he wanted half of McIver's commission. When McIver resisted, Quick warned him that unless he complied petitioner would stop the sale. Quick also told McIver that petitioner had said that McIver's other project, the sale of Big Talbot Long Island, was "dead." During the next two weeks, Quick met repeatedly with McIver in an attempt to extort a payment for him. He told McIver that petitioner wanted $200,000 when the Seminole Ranch was purchased and $35,000 when Big Talbot Long Island was acquired (8 R. 27-28). In November, McIver indicated to Quick that he would accede to his demands. In December, the IAC met and voted to recommend that the State purchase Big Talbot Long Island (8 R. 36-40).

Petitioner and Quick never succeeded in obtaining money from McIver. In January 1979, Florida newspapers reported that the FBI was investigating the attempted extortion of McIver. The State then halted all purchases of land under the Environmentally Endangered Lands Program (8 R. 42-43).

2. Prior to trial, petitioner moved to suppress evidence of tape recordings of three conversations in which he and Quick had discussed their attempt to extort money from McIver (Pet. App. 8a). The circumstances surrounding the tape recording of these conversations were as follows: In October 1978, Quick asked a private investigator, Gene Andrews, to assist him in tape recording his conversations

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[2] "R." refers to the record in the court of appeals. "S. Tr." refers to the transcript of a hearing on petitioner's motion to suppress, held in April 15, 1980 in the United States District Court for the Middle District of Florida. That transcript was made part of the record in this case.

with petitioner. Quick wanted a record to ensure that petitioner would live up to his agreements concerning the McIver transactions, and he also wanted to be able to blackmail petitioner to participate in future corrupt land deals. After telling Quick that he could probably assist him, Andrews reported Quick's request to the Federal Bureau of Investigation (S. Tr. 13-17; 9 R. 52-53, 57-59; 10 R. 11).

In November 1978, the FBI gave Andrews a body recorder and a radio transmitter. Andrews went to Quick's office and placed those devices in a concealed position on Quick's body. Andrews told Quick that he would be wearing both a recorder and a radio transmitter so that Andrews would overhear the conversation. When Quick was ready to leave his office for a meeting with petitioner, Andrews turned on the recorder (9 R. 59-62; S. Tr. 20-22). Quick then proceeded alone to petitioner's office, and the ensuing conversation was recorded on tape. When Quick returned to his own office, Andrews turned off the recorder and the transmitter. He then returned the equipment to the FBI (9 R. 62; 10 R. 15). Similar recordings were made on two subsequent dates. On all three occasions, FBI agents listened to radio transmissions of the conversations (10 R. 13-20, 39-49; S. Tr. 24-32, 105-119, 136-143).

In moving to suppress the tape recorded conversations, petitioner contended that the government had violated the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. (& Supp. IV) 2510-2520, because a warrant authorizing interception of the conversations had not been obtained. The court of appeals held (Pet. App. 12a-16a) that the recordings did not violate the Fourth Amendment because they were made with the consent of one of the participants. The court also held that the FBI agents were not required to obtain a warrant before listening to the tapes furnished by Andrews (*id.* at 14a-16a).

The court held (Pet. App. 8a-11a) that Title III had not been violated because under 18 U.S.C. 2511(2)(c), it is not unlawful "for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception."

ARGUMENT

The decision of the court of appeals is correct and does not conflict with prior decisions of this Court or with a decision of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner contends (Pet. 5-6) that the tape recording and transmission of his conversations violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968. However, those interceptions were plainly lawful under 18 U.S.C. 2511(2)(c), a provision of Title III which permits the electronic interception of private conversations by persons "acting under color of law" when one of the parties to the conversation has given his consent.

a. Petitioner argues (Pet. 5-6) that 18 U.S.C. 2511(2)(c) is inapplicable because Quick did not know that Andrews was cooperating with the FBI and thus "did not consent to the F.B.I.'s interception of his conversations." Petitioner's argument is frivolous. By its terms, 18 U.S.C. 2511(2)(c) merely requires that consent for the interception be given by a party to the conversation, not that the party have knowledge that the person making the interception is cooperating with the government. Petitioner cites no authority for the novel proposition that such knowledge is required. Moreover, it is apparent that 18 U.S.C. 2511(2)(c) was drafted to permit the consensual monitoring of conversations where permitted by the Fourth Amendment. This Court has held that it is constitutional to intercept a conversation with the

consent of one of the participants because no "constitutionally justifiable expectation of privacy" is violated (*United States* v. *Caceres*, 440 U.S. 741, 751 (1979), quoting *United States* v. *White*, 401 U.S. 745, 751 (1971) (opinion of White, J.)). The Court has reasoned that a participant could have testified concerning the conversation and that to bar the recording of the conversation would therefore be to say that another party to the conversation "has a constitutional right to rely on possible flaws in the [consenting participant's] memory, or to challenge [his] credibility without being beset by corroborating evidence that is not susceptible of impeachment." *Lopez* v. *United States*, 373 U.S. 427, 439 (1963). This reasoning is equally applicable whether or not the participant who consents to the interception knows that the person making the interception is cooperating with authorities. In either event, the nonconsenting participant's legitimate expectation of privacy is precisely the same.

b. Petitioner also argues (Pet. 5-6; see also Pet. App. 9a-10a) that Quick, not Andrews, tape recorded the conversation and that Quick was not acting "under color of law" because he was unaware of Andrews' cooperation with the FBI. This argument is clearly invalid as well.

The term "intercept" is defined by 18 U.S.C. 2510(4) to mean "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." Accordingly, it is apparent that the conversations in question were intercepted both by Quick (who wore the body recorder and transmitter) and Andrews (who attached the electronic devices to Quick and turned them on and off), as well as the FBI agents who listened to those conversations on radios. Thus, for purposes of this particular contention, it is irrelevant whether Quick was acting "under color of law" or whether his

actions were illegal (see 18 U.S.C. 2511(1), (2)(d) (participant may not intercept conversations for criminal or tortious purposes)). Andrews[3] and the agents were acting "under color of law", and their interceptions were lawful under 18 U.S.C. 2511(2)(c). Consequently, the contents of the conversations they intercepted could lawfully be received in evidence. See 18 U.S.C. 2515 (intercepted communications may not be admitted in evidence if disclosure is unlawful); 18 U.S.C. 2511(1)(c) (disclosure of intercepted communications unlawful if person making disclosure knows or has reason to know that communication was illegally intercepted).

2. Petitioner also contends (Pet. 6-7) that his Fourth Amendment rights were violated by the recording and transmission of his conversations. As noted, however, this Court has consistently held that the Fourth Amendment does not prohibit the recording or transmission of a conversation so long as one of the parties consents. *United States* v. *Caceres, supra; United States* v. *White, supra; Hoffa* v. *United States*, 385 U.S. 293 (1966); *Lewis* v. *United States*, 385 U.S. 206 (1966); *Lopez* v. *United States*, 373 U.S. 427 (1963); *On Lee* v. *United States*, 343 U.S. 747 (1952).

Petitioner's reliance (Pet. 6) on *Walter* v. *United States*, 447 U.S. 649 (1980), is misplaced. There, boxes containing obscene films were mistakenly delivered to a private party, who examined their contents and then gave them to the FBI without screening the films. The FBI later screened the films

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[3]The courts of appeals have consistently held that private citizens are acting "under color of law" within the meaning of 18 U.S.C. 2511(2)(c) when they intercept conversations at the request of or in cooperation with government investigators. See, *e.g.*, *United States* v. *Howell*, 664 F. 2d 101, 104-105 (5th Cir. 1981), cert. denied, No. 81-6185 (Mar. 8, 1982); *United States* v. *Tousant*, 619 F. 2d 810, 813 (9th Cir. 1980); *United States* v. *Craig*, 573 F. 2d 455, 474 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978); *United States* v. *Rich*, 518 F. 2d 980, 985 (8th Cir. 1975).

without obtaining a warrant. The Court held that the Fourth Amendment was violated because the screening of the films constituted a separate search, and no exception to the warrant requirement was applicable.

The tapes in this case are not at all comparable to the films in *Walter*. The films were the property of the defendants in *Walter*, not the private party to whom they were mistakenly delivered. Thus, the private party could not authorize the government to search the films, and the FBI's subsequent warrantless search violated the defendants' rights. Here, the tapes were not petitioner's property. As the court of appeals correctly concluded (Pet. App. 16a), Andrews' interest in the tape was "sufficient to enable him to authorize the [FBI agents to listen] to the recorded conversations." "He had recorded the conversation, and had purportedly taken the original tape with Quick's consent to make copies. Furthermore, Quick knew that Andrews had retained his own tape * * *." (Pet. App. 15a-16a). Moreover, even if the tape belonged to Quick rather than Andrews, a subsequent search would not have violated petitioner's rights. See *Rakas* v. *Illinois*, 439 U.S. 128 (1978). Compare, *Walter* v. *United States, supra*, 447 U.S. at 658 (opinion of Stevens, J.); *id.* at 662 (opinion of White, J.).

Furthermore, there was no separate search in this case when the agents played the tape furnished by Andrews. They merely heard once again what had been transmitted over the radio and what Andrews had heard first-hand. Compare *Walter* v. *United States, supra*, 447 U.S. at 656-660 (opinion of Stevens, J.); *id.* at 661 (opinion of White, J.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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